

**Draft Provision for Section 404 Assumption MOA Between DEP and EPA Addressing Impacts
To Threatened and Endangered Species**

**II. PERMIT APPLICATION REVIEW AND ISSUANCE FOR PERMITS AUTHORIZING DISCHARGES WITH
REASONABLE POTENTIAL TO AFFECT A THREATENED OR ENDANGERED SPECIES.**

E. Coordination concerning discharges with reasonable potential for affecting endangered or threatened species.

1. Consistent with the 404(b)(1) Guidelines regulations, no discharge of dredged or fill material shall be permitted if the discharge jeopardizes the continued existence of endangered or threatened species or results in the likelihood of destruction or adverse modification of designated critical habitat. 40 CFR 230.10(b)(3). In addition, the permitting authority must specify whether the proposed disposal sites for the discharge of dredged or fill material comply with the requirements of the 404(b)(1) Guidelines (including the prohibition against jeopardy found in 230.10(b)(3)). 40 CFR 230.12. If there does not exist sufficient information to make a reasonable judgment as to whether the proposed discharge will comply with the 404(b)(1) Guidelines, then the permitting authority must specify that the discharge fails to comply with the 404(b)(1) Guidelines. 40 CFR 230.12(a)(3)(iv).
2. If, prior to providing public notice for a complete permit application and submitting such notice to EPA in accordance with 40 CFR 233.50(c)(1), DEP's initial review of the permit application indicates that proposed discharges may have reasonable potential to affect a threatened or endangered species, DEP may share the application documentation with Florida Fish & Wildlife Conservation Commission (FWC). DEP and FWC may coordinate to assess the potential effects on protected species.
 - a. If during the early pre-application review of the proposed project, where threatened or endangered species are identified as potentially present on the project site, the applicant, after discussions with DEP, takes steps to avoid and/or mitigate for any endangered or threatened species such that reasonable potential to affect an endangered or threatened species no longer exists, federal review will not be triggered under 40 CFR 233.51(b)(2). The proposed discharge(s) may still fall into another category identified in subsection II.B.(1) of this Agreement.
 - b. If during the early review of a proposed project, DEP takes significant action related to the consideration of a pending permit application where endangered or threatened species are identified as potentially present on the project site, DEP shall promptly transmit that notice of action to EPA. Consistent with 40 CFR §233.50, if EPA, indicates it plans to object to the issuance of the potential permit and identifies the steps that DEP must take to address those objections, DEP may not issue the permit and must provide EPA the information necessary to address the objection. If DEP neither satisfies EPA's objections nor denies the permit, DEP shall send a complete permit application package to the Army Corps of Engineers and the Secretary of the Army shall process the permit application.
3. If DEP determines that the proposed discharge has reasonable potential to affect protected species, then the proposed discharge is not eligible for EPA waiver of federal review. 40 CFR

233.51(b)(2). DEP will transmit the public notice for the complete permit application and other required documents to EPA for review pursuant to 40 CFR 233.50(a). DEP will also include in the transmission 1) a description of DEP's findings, including any findings as to whether DEP believes that any effects to listed species or habitat comply with the 404(b)(1) Guidelines; 2) any supporting analysis or documentation from DEP and/or FWC; 3) any relevant information developed or obtained during coordination with the state or federal wildlife agencies; 4) any recommendations to EPA regarding whether, in the State's judgment, effects to listed species or habitat should be addressed through the procedures under section 7(a)(2) of the Endangered Species Act that would apply in the event, pursuant to the procedures described below, the permit application were to be transferred to the Army Corps of Engineers.

4. EPA will review the public notice for the complete permit application pursuant to 40 CFR 233.50. EPA will share the public notice and other information needed for the review with the Corps, NMFS, & USFWS for federal review and they will provide any comments to EPA pursuant to the procedures in 40 CFR 233.50(b).
 - a. If the discharges may affect a threatened or endangered species, but if, after coordination with FWS and/or Florida FWC, DEP believes the discharges are not likely to adversely affect listed species (e.g., the effects are beneficial, insignificant, or discountable), and the Service agrees with that finding, the Service may provide concurrence in writing and no further coordination would be required.
 - b. Alternatively, if there is reason to believe the discharges may likely affect an endangered or threatened species, DEP may initiate ESA § 10 procedures with the Service and seek an incidental take permit.
5. After receipt of any comments from the Corps, NMFS, & USFWS, EPA will decide whether to comment, object, or require permit conditions pursuant to 40 CFR 233.50(d).
 - a. Under the 404(b)(1) Guidelines, an EPA objection to a proposed permit could arise if the proposed permit is "outside requirements of the Act, these regulations, or the 404(b)(1) Guidelines." 40 CFR 233.50(e)(2). EPA could object based on a finding by EPA that the proposed activities will jeopardize the continued existence of species listed as endangered or threatened under the Endangered Species Act or result in the likelihood of the destruction or adverse modification of designated critical habitat. 40 CFR 230.10(b)(3).
 - b. In deciding whether to exercise its objection authority, EPA will consider any information and recommendations submitted by the State and give appropriate deference to the State's views given the substantial expertise of Florida agencies related to protection of endangered and threatened species. If EPA finds that the proposed discharge will jeopardize the continued existence of listed species or results in the likely destruction or adverse modification of designated critical habitat, EPA intends to object to the permit as failing to comply with the 404(b)(1) Guidelines or communicate a requirement for permit conditions in order to ensure compliance with the 404(b)(1) Guidelines.
 - c. If EPA objects to a permit or communicates a requirement for a permit condition, DEP cannot issue the permit. Pursuant to 40 CFR 233.50, options for proceeding after an EPA objection are:

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- a. EPA withdraws the objection or requirement for a permit condition and the State may then issue the permit.
- b. DEP revises the permit to satisfy the objection or requirement for a permit condition.
- c. If DEP neither satisfies EPA's objections or requirement for a permit condition nor denies the permit, the Corps shall process the permit application. If the Corps processes the permit application, the Corps will be responsible for fulfilling any applicable requirements under section 7(a)(2) of the Endangered Species Act. Under Endangered Species Act regulations, the Corps may designate the state as its non-federal designee to conduct informal ESA consultation or prepare a biological assessment. 50 CFR 402.08.